

ADVISORY OPINION 2006 – NO. 1

August 17, 2006

Background

In December, 2005 we issued Complaint Opinion 2005-No. 7, In Re Green. The complaint alleged that a legislator improperly utilized public resources to intervene on behalf of one of the parties to a labor dispute. We agreed. The Ethics in Public Service Act (Act) prohibits a legislator or legislative employee from using public resources to benefit self or others unless that use is part of official duties (RCW 42.52.160). We concluded, on page 3 of the opinion:

...

(4) It is not part of a legislator's official duties to use public resources, which includes Legislative Assistants, to become involved in a purely private labor dispute.

Later, a legislator requested informal advice from the Board's counsel as to whether the Act would allow the legislator to use public resources to send a letter to a new employer of an existing business, at the request of employees, urging the employer to retain union employees. Citing Green, the advice was to not use public resources to send the letter.

Several legislators requested the Board revisit and perhaps clarify or modify the Green opinion. These requests were discussed by the Board and some of the concerned legislators at a public meeting on April 20, 2006, and a subcommittee of the Board was appointed to consider the points raised by the legislators and report back to the Board. The subcommittee met on May 8, June 15, and July 20 and concluded that the legislators had raised questions which should be addressed in a new advisory opinion and that certain clarifications of the Green opinion were warranted.

We agree, and issue this opinion on our own motion in the hope it will assist legislators in determining when public resources may be used to assist constituents.

Question #1: Does this advisory opinion address constitutional freedom of speech issues, which have been raised by some of the legislators?

Answer: No. This opinion is limited to the use of public resources as permitted by the Ethics in Public Service Act (Act). The Legislative Ethics Board lacks jurisdiction to determine the constitutionality of the Act or any portions thereof. We remind legislators that we have consistently advised that nothing in the Act prohibits them from speaking to any issue at any time absent the use of public resources and legislative office.

Question #2: Are labor issues or disputes, as a category, analyzed differently from other

issues or disputes either by the Act or by the Board when the issue is use of public resources?

Answer: No. Green happened to involve an employee/employer controversy but the tests for proper use of public resources in any circumstance are contained in the Act. Concern has been expressed that Green might be read as standing for the proposition that labor disputes are per se private disputes and for that reason the use of public resources is never permitted. This interpretation is not supported by the Act or any prior opinions of this Board and we categorically reject it. It is more accurate to say that Representative Green's general interest in labor issues and her general support for labor interests could not justify the use of taxpayer resources to advocate on behalf of one of the parties involved in employer/employee negotiations.

Question #3: What are those tests?

Answer: The Act permits use of public resources when performing ". . . duties within the scope of employment . . ." (RCW 42.52.070), or use of public resources ". . . as part of a state officers . . . official duties. . . ." (RCW 42.52.160), or use of public resources involving campaign related activities which ". . . are part of the normal and regular conduct of the office or agency . . ." (RCW 42.52.180)

Question #4: Are these terms defined in the Act?

Answer: Only partially, and not always with a great deal of specificity. RCW 42.52.010(12) defines "official duty" as those duties within the specific scope of an official's employment as defined by the agency, or by statute, or by the state Constitution. The Board has had to determine the meaning of these terms through advisory and complaint opinions. For instance, in Advisory Opinion 1995-No. 17 the Board recognized that legislators have certain discretionary duties with regard to issues raised by constituents which would allow use of public resources, specifically in the case of certain types of recommendation and congratulatory letters.

Question #5: The statute which limits election year mailings at public expense (RCW 42.52.185) refers to "constituents" as individuals. Are the restrictions on the use of public resources to assist constituents limited to assistance offered to individuals?

Answer: No. In the context of this opinion, "Constituents" form a class broader than individuals. The mailing statute specifically defines a constituent as an individual "(F)or purposes of this section . . .," whereas RCW 42.52.070 (special privileges) is applicable ". . . to any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit" and RCW 42.52.160 prohibits use of certain resources for the private benefit or gain of "another"-- a term not defined in the Act but which we view as compatible with the definition in .070.

Question #6: When do the concerns of a constituent permit a legislator to use resources

supplied by taxpayers to address those concerns?

Answer: Those sections of the Act which speak to the proper and improper uses of public resources clearly evidence intent by the legislature that the use of these resources not be unlimited. A threshold question is whether there is a tangible legislative nexus with the contemplated use of public resources or whether that legislative nexus is negligible. The Board has issued a number of advisory and complaint opinions which provide examples for guidance. Those opinions also recognize certain discretionary functions which have been historically performed by legislators with the use of public resources.

Question #7: If the "tone and tenor" of a letter sent at state expense on behalf of a constituent is not objectionable, does it make any difference under the Act what the subject matter of the letter might be?

Answer: Yes. Tone and tenor cannot be the sole test for appropriate use of public resources to prepare and send a letter at public expense on behalf of a constituent because the legislature has placed conditions on the use of public resources beyond tone and tenor. The legislature has said that public resources may not be used ". . . to secure special privileges . . ." (RCW 42.52.070), ". . . for (the) private benefit or gain . . ." (RCW43.52.160), or ". . . to directly or indirectly assist a campaign for election . . ." (RCW 42.52.180. A cordial letter at public expense in violation of these restrictions is still a violation, regardless of tone and tenor.

Question #8: In Green the Board concluded that the legislator should not have used public resources "to become involved in a purely private labor dispute." Is there more concise or accurate language which clarifies the Board's intent?

Answer: Yes. Upon reflection we believe "involved" is not an adequate descriptive term. We believe "advocacy" comes closer to expressing our opinion within the context of the facts in Green. There may be situations when it is appropriate under the Act for legislators to use public resources to become "involved" in an issue though not appropriate to "advocate" for one person or group over another person or group. Examples could include the use of public resources to act in an ombudsman capacity, to act as a mediator, or to perform an investigative function. When a legislator has a sufficiently strong personal interest and benefit, the legislator's ombudsmen role will be carefully examined. On the other hand, it may be appropriate under the Act to take the next step, with the use of public resources, and be an advocate for a constituent or group of constituents. Again, this will depend upon whether there is a tangible legislative nexus, as opposed to a negligible or perhaps speculative nexus, and the intent of the "examples" portion of this advisory is to assist legislators in recognizing the difference.

Examples

In Advisory Opinion 2005-No. 1, the issue was the use of public resources to compose and

send congratulatory letters to constituents. We observed then, and now, that it is not possible to identify each instance when the Act permits or denies the use of public resources. The legislature has determined that improper use of public resources is a violation of the Act but the Act does not, with the exception of campaign use and congratulatory letters, supply the standards for determining proper use of those resources in most situations. This Board has been charged by the legislature with implementing the Act and rules adopted under it with respect to members and employees of the legislature (RCW 42.52.320) and for over a decade the Board has issued advisory and complaint opinions pursuant to this mandate.

In response to questions raised by legislators we refer to the advisory and complaint opinions, the Legislative Ethics Manual, and previous informal advice reviewed by the Board from which we offer the following *non-exclusive* examples to assist legislators and legislative staff.

A legislator may use public resources to assist constituents when -

- a. assisting a constituent in the resolution of a dispute between the constituent and a government agency, and advocating on behalf of the constituent, subject to the laws against undue influence and special privilege;
- b. appearing and speaking at a rally on the Capitol steps, for instance, in support of constituents who are requesting legislation or endorsing or opposing legislation;
- c. providing legislative advice or legislative assistance such as assisting constituents in understanding how the legislative process works, how to get a bill introduced, how to testify before committees, etc.;
- d. carrying out a community or public purpose function which has been firmly established by historical custom and practice such as writing a letter to a member of Congress supporting an appointment to a service academy; writing a letter to non-profit endorsing the organization which is performing a public good or service; or writing a letter to a state agency containing only the legislator's favorable recommendation for a constituents application for a grant from the agency and a statement urging approval;
- e. gathering or investigating facts surrounding an issue or dispute involving constituents and a government office or government official, or between constituents. Examples of the latter could include a claim by one constituent that his water rights were being adversely affected by adjoining landowners. A legislator is expected to respond to requests for information and, up to the point of advocacy in this dispute between neighbors, the legislator may certainly provide information on the status of the law, who to contact in the appropriate state agency etc. In addition, a constituent may approach a legislator with a problem or issue which might require legislation to resolve or perhaps would trigger a legislative hearing or fact-finding endeavor. The use of public resources to assist these constituents in these contexts is clearly

appropriate.

A legislator may not use public resources to assist a constituent when –

- a. either through a constituent's request or the legislator's own initiative the legislator assumes the role of advocate in a dispute between parties not involving government officials or government offices. Examples would include the use of public resources to travel to and attend a court hearing on behalf of one of the parties in a child custody battle and the use of a legislative assistant to write a letter to an employer or an employee group under circumstances where it is clear the legislator has become an advocate for one of the parties involved in a dispute;
- b. improper means are used to try to influence a government agency or commission in an effort to confer a private benefit or gain for a constituent or to secure special privileges for the constituent. "Improper means" could be evidenced by a threat directed at agency employees while seeking a special favor for a constituent. Note that improper means will negate the otherwise permissible intervention with a government entity on behalf of a constituent;
- c. a legislator is a member of a homeowner's association and uses legislative staff to write association officials complaining about the official's proposed course of action or a legislator/parent uses legislative stationery to write a school principal on behalf of parents of children who were rudely treated on the school grounds and the legislator's child was present.

Summary

Legislators have duties beyond those enumerated in the legislative article, Article II of the State Constitution. These duties, referred to in Board opinions as discretionary in nature, include community and public purpose functions and have been firmly established by historical custom and practice. These discretionary duties involve assisting constituents with government officials and government offices. These particular legislative duties may result in the legislator becoming an advocate for the constituent. When dealing with a government entity or official a legislator may be the constituent's advocate provided the legislator does not employ improper means in the process.

In addition to introducing, debating or voting on bills, a legislator may be involved in assisting constituents with obtaining facts, or assisting constituents by facilitating or mediating a dispute. In most of these cases it would be permissible under the Ethics Act to use public resources to perform these discretionary duties, such as when a dispute was between a constituent and a government agency or official and the legislator is attempting to gather the facts necessary to fully understand the issue in an effort to see if the constituent can be helped.

The Act does not permit the use of legislative position or public resources by legislators to assist constituents solely because a legislator has an interest in the subject matter or in the constituent's cause. When we said, in Advisory Opinion 1995-No. 17, that ". . . legislators do possess expansive authority to carry out these community or public purpose functions," and "Citizens expect their legislators to be ombudsmen and community leaders . . ." we had been asked to comment on four specific examples of letters proposed to be prepared at public expense. That opinion should not be read as standing for the proposition that there are no restrictions on the use of public resources except those that might be imposed by legislators themselves.

When a legislator becomes an advocate for a constituent, public resources and the office of the legislator may be used on behalf of that constituent if a government official or government office is involved or if the constituent is seeking assistance on legislative issues. If either of these two conditions is met, there is a sufficient and tangible legislative nexus to conclude that the advocacy is within the scope of a legislator's employment and/or within his or her official duties.